The Huntington National Bank
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By e-mail to: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Attn: Docket Number R-1305

Re: Proposed Rule—Regulation Z Mortgage Protections
73 *Fed. Reg.* 1672 (Jan. 9, 2008)

Dear Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank[1] in response to the above referenced rule proposed by the Board of Governors of the Federal Reserve System (the "Board") to establish new regulatory protections for consumers in the residential mortgage market through amendments to Regulation Z under authority granted to the Board under the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"). We appreciate the opportunity to provide the comments set forth below with respect to the proposed rule.

In general, we support the intent of the proposed rule to subject non-bank lenders to lending requirements similar to those already applicable to depository institutions in recognition

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[1] The Huntington National Bank ("Huntington Bank") is a national bank and the principal subsidiary of Huntington Bancshares Incorporated, which is a $55 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 142 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 600 regional banking offices in Indiana, Kentucky, Michigan, Ohio, Pennsylvania and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 1400 ATMs. Selected financial service activities are also conducted in other states including: dealer sales activities in Arizona, Florida, Nevada, New Jersey, New York and Tennessee; private financial and capital markets group services in Florida; and mortgage banking offices in Maryland and New Jersey. Huntington Bank's affiliate, Sky Insurance, offers retail and commercial insurance agency services in Ohio, Pennsylvania, Michigan, Indiana and West Virginia. International banking services are made available through the headquarters office in Columbus, a limited purpose office located in the Cayman Islands and another office located in Hong Kong.

that the majority of abuses in the mortgage market have resulted from actions and practices of non-depository lenders and other state regulated or unregulated participants in the mortgage market. Our primary comments are with respect to the newly created category of "higher priced mortgage loans", and we also have additional comments as set forth below.

Excessive Penalties

We note that to the extent any of the proposed rules are based on the Board's authority under TILA section 129 as added by HOEPA, the available civil liability for violations under TILA section 130 is more severe than for violations of disclosure requirements issued by the Board under TILA section 105. For many of the provisions of the proposed rule, it does not appear appropriate to trigger the more severe penalties associated with HOEPA loans, since particularly for prime and Alt-A loans the problems facing consumers are less a result of loan characteristics and features than of declining real estate values and tightening credit, and borrowers on prime and Alt-A loans have more ability to recover than do borrowers on subprime loans. We are concerned that this extension of HOEPA penalties by the Board creates excessive liability for depository institutions that will result in higher costs and less product availability for consumers. Thus in general, and in the specific comments below, we recommend that the Board find ways of mitigating the harsh effect of HOEPA penalties on loans that were never originally intended to be subject to such excessive penalties.

Threshold for Higher Priced Mortgage Loans

The Board is proposing in section 226.34 a new category of mortgage loans based on pricing and referred to as "higher priced mortgage loans" ("HPMs") that would have specific new requirements applicable to them. This new category of mortgage loans is defined as a spread over Treasury securities, and as proposed will include a substantial portion of a depository institution's prime and Alt-A loans. This has the result of subjecting depository institutions to private rights of action under the Truth in Lending Act for alleged violations of the new requirements applicable to HPMs, not only for any subprime loans the institution may make (if any), but also for a substantial portion of the institution's prime and Alt-A loans.

We urge the Board to adopt a test for HPMs that excludes prime and Alt-A mortgages by basing the threshold on an index that is more relevant to pricing in the mortgage market than the yield paid on Treasury securities. The Board's establishment of HPMs will become the new *de facto* definition of subprime lending, a concept that has been notoriously difficult to define in a consistent and uniform manner, particularly based on a simple measure such as annual percentage rate. Many banks and other depository institutions do not consider themselves to be subprime lenders. To the extent that the Board's HPM definition broadly encompasses a significant number of prime and Alt-A loans, depository institutions that make loans which they believe are not subprime, but which nonetheless are captured by the HPM test, will either have to increase prices to cover the additional costs and risks, or further cut back on product offerings in order to make as few HPMs as possible.

We support the comment letters submitted by the American Bankers Association and the Consumer Bankers Association which discuss this threshold and definition problem in detail and make recommendations with respect to alternative indices that better reflect mortgage pricing and appropriate spreads that more accurately exclude prime and Alt-A mortgages. We note, however, that because of differences in the way home equity loans and credit lines are priced as compared to home purchase loans, there may also need to be different indices applicable to different types of mortgage loans in order to better reflect the pricing and spreads applicable to the different types of mortgage loans. While we are concerned about the further complexity this would introduce, we believe that it is even more important to have a test that successfully excludes most prime and Alt-A mortgages from the HPM classification.

Ability to Pay

The Board is proposing to require HPMs to meet the same "ability to pay" standard as is applicable to HOEPA loans. We are concerned that it may be difficult for the creditor to have a reasonable degree of certainty as to whether or not it can avoid claims that it has violated this ability to pay standard, even at the level of a pattern or practice, because of the somewhat vague contours of this requirement and the opening that provides for opportunistic litigation, particularly with the availability of the extra HOEPA liability under TILA section 130. We note that pursuant to regulations of the Office of the Comptroller of the Currency ("OCC") in 12 C.F.R. 34.3(b), national banks are already prohibited from making a mortgage loan "based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms." Because depository institutions have not been the source of the problems this proposed rule is intended to address, and because of the comprehensive and extensive federal banking regulatory agency oversight of depository institutions through regulations, guidance, directives, examination, enforcement and other available means, it is neither necessary nor appropriate to subject such federally regulated depository institutions to the private enforcement remedies of TILA with respect to this requirement. In order to avoid this result and still maintain a level playing field for all creditors, we recommend that the Board provide that this ability to pay standard applies to depository institutions only if the depository institution is not subject to a comparable requirement from its primary federal banking regulator. We believe the Board should recognize in the Official Staff Commentary that the OCC's rule with respect to ability to pay (and comparable rules of other federal banking regulators that may exist) is such a comparable requirement.

Prepayment Penalties

The proposed rule would prohibit prepayment penalties for HPMs if (i) the consumer's debt-to-income ratio at consummation exceeds 50%, (ii) the loan that is paid off is from funds of the same creditor or an affiliate, (iii) the penalty term exceeds five years, or (iv) the penalty does not expire at least 60 days before the first date on which the loan payment may increase. We note that the concerns that these restrictions on prepayment penalties are intended to address have been at least partially covered by other requirements of the proposed rule, namely that the creditor must underwrite the loan based on an ability to repay at whatever the highest payment might be up to the time designated in the rule, and thus generally the consumer should not be faced with a payment increase that the consumer cannot afford to pay.

We support the five year limit on prepayment term, and we also support expiration of the penalty 60 days prior to a payment increase as long as the increase is substantial—for example, an increase in the payment amount by 15%. We believe that the other restrictions proposed for HPM prepayment penalties are excessive—prohibiting the consumer, for example, from returning to the same bank that the consumer normally deals with and where the consumer may be eligible for preferential pricing based on other relationships, or limiting the options for consumers in higher priced areas of the country based on the 50% debt-to-income limitation.

Escrows

We believe that the requirement for escrows for taxes and insurance that the Board is proposing for HPMs that are first mortgages is not necessary and would create undue expense that would not be in the best interest of consumers. The requirement to underwrite the loan based on the ability to repay—which includes the ability to pay taxes and insurance in connection with the mortgage loan—already creates an important level of protection. To the extent that the Board is concerned that consumers—particularly first time home buyers—may not be fully aware of the additional costs of taxes and insurance, that concern can be addressed by additional disclosures provided pursuant to the authority of the Board under TILA section 105. We also note that section 3500.17 of HUD's Regulation X under RESPA already provides for significant disclosures and other requirements with respect to escrows.

Thus, instead of a newly imposed requirement mandating escrows, we recommend that the Board, pursuant to its authority under TILA section 105, add a new textual disclosure requirement to the closed-end "Fed box" payment schedule that would be applicable if the loan is secured by a mortgage on the consumer's principal dwelling to read something like the following: "In addition to the loan payments, you will also have to pay for taxes and insurance on the property. Ask us about these additional costs."

Evasion Through Open-End Credit

With respect to HPMs, the Board is proposing to add a prohibition on structuring a closed-end loan as an open-end loan to evade the requirements of section 226.34. This prohibition is extremely vague and it will be nearly impossible for any creditor to know with any reasonable degree of certainty that it has not been violated any time the credit application or any discussion with the applicant includes the possibility of either a closed-end mortgage loan or a home equity credit line (consumers are often not sure which they want). Additionally, the opportunity to enforce this vague and uncertain requirement through private rights of action that have the additional HOEPA remedies will create significant additional liability and costs. To the extent the Board is concerned with so-called "spurious" open-end credit, we believe there needs to be clearer identification of the evil that is intended to be addressed when it comes to mortgage lending. Home equity credit lines are subject to significant disclosures and restrictions that are not applicable to closed-end mortgage loans. The end result of this proposal is likely to be that banks will not make home equity credit lines available to anyone who might as a closed-end borrower be subject to the HPM restrictions, when a home equity credit line may be a preferable way for the consumer to borrow. We recommend that the Board delete this new requirement as being too unclear and uncertain.

Mortgage Broker Disclosure

The Board is proposing in section 226.36 to prohibit creditors from making any payment to a mortgage broker unless the broker enters into a written agreement with the consumer that satisfies the conditions set forth in this proposed rule. While we strongly support a requirement that brokers enter into such written agreements with consumers and provide appropriate disclosure to the consumer of all of their fees, we do not believe that the Board should be proposing this requirement under Regulation Z at this time. We note that the Office of the Comptroller of the Currency is actively requiring national banks to obtain copies of such agreements from the brokers they use and to maintain those copies in the bank's files. Furthermore, the Department of Housing and Urban Development ("HUD") has recently proposed revisions to its regulations under the Real Estate Settlement Procedures Act ("RESPA"),[2] which include provisions related to mortgage brokers and fees paid to mortgage brokers, and it would be most appropriate for the Board and HUD to coordinate their efforts with respect to broker agreements and disclosure of broker fees to consumers. As currently proposed, HUD's RESPA proposal regarding broker fee disclosures appears to be inconsistent in many ways with that proposed by the Board, and it is not at all clear how creditors and brokers can resolve those differences.

While it appears that the Board may have authority under section 129(l)(2) of TILA (as added by HOEPA) to prohibit conduct of brokers who are not creditors, we note that the civil liability provisions of section 130 of TILA apply only to "creditors", and thus apparently would not apply to brokers. Therefore, even if the Board were to recraft this requirement to impose obligations directly on the brokers, there would be no effective enforcement mechanism under TILA for broker violations of such obligations. We assume this is the reason the Board has crafted the requirement in proposed section 226.36 as a prohibition applicable to the creditor and not a prohibition or requirement directly applicable to the broker. However, such an attempt to regulate brokers indirectly through direct regulation of the creditor is essentially unfair to the creditor and can lead to liability for the creditor through no fault of the creditor. For example, the creditor can never be certain that the broker agreement was entered into before the creditor's payment to the broker, or even if the broker agreement was ever actually entered into between

[2] 73 *Fed. Reg.* 14030 (Mar. 14, 2008).

the broker and the consumer, or whether the broker is in compliance with the agreement, or whether the agreement correctly reflects the fees actually charged by the broker to the consumer. Additional complications arise if the provisions of the loan are different at closing from what they were at the time the broker agreement was entered into. We recommend that the Board withdraw this proposed requirement at this time and give further consideration as to how best to coordinate with HUD and requirements under RESPA, and with requirements being imposed by other federal banking agencies, in order to provide an effective, uniform and consistent federal requirement with respect to broker agreements and disclosure.

Furthermore, we note that the Board's broker agreement requirement is made not applicable in certain circumstances where state statutes impose comparable duties. This deference to state law requirements will only lead to inconsistencies, confusion, and further burden on creditors who will have to become familiar with all state law requirements across the country applicable to brokers and make judgments as to whether those requirements and compliance therewith by the broker provide an exemption under this new provision of Regulation Z. We respectfully submit that the need for national uniformity and a national standard for broker fee disclosures is undermined by the approach the Board is taking here, and we recommend that these provisions deferring to state law be eliminated.

Coercion of Appraisers

The Board is proposing a requirement applicable to all loans secured by a consumer's principal dwelling that prohibits a creditor or broker[3] from directly or indirectly coercing, influencing or otherwise encouraging an appraiser to misstate or misrepresent the value of the dwelling. We agree that restriction of undue influence over appraisers is appropriate, but the Board is proposing to prohibit creditors from making any loan based on an appraisal if the creditor "knows or has reason to know" of coercion in connection with the appraisal. This standard is likely to provide the basis for costly nuisance litigation over whether the creditor "should have known" about some set of facts that could have led to an awareness of coercion. Rather, any standard here for the creditor should be one of actual knowledge. Creditors have limited ability to detect undue influence from other third parties, such as mortgage brokers or real estate agents, and the Board's standard will simply encourage more litigation against the depository institution deep pocket.

Servicing Practices

The Board is proposing to prohibit the following servicing practices: (i) failure to credit a payment as of the date received, (ii) "pyramiding" late fees, (iii) failure to provide a schedule of fees and charges upon request, and (iv) failure to provide a payoff statement upon request. Our primary concern with this proposal is with the excessive liability accompanying even the most minor infraction. Any violation of these requirements is subject to the HOEPA penalties

[3] Here, the Board makes this requirement apply directly to the broker as well as the creditor, even though the civil liability provisions of TILA section 130 apply only to "creditors".

under TILA section 130. If amid the many thousands of accounts and transactions handled by a servicer the servicer, for example, neglected to send, or delayed sending, a payoff statement upon request at the end of a 30-year mortgage loan, the servicer (at least if the servicer was the creditor[4]) on that loan would be liable to the borrower for a refund of all the interest and fees paid over that 30-year period, which could be hundreds of thousands of dollars, in addition to the other penalties under TILA section 130. Additionally, the requirements themselves that are subject to these excessive and disproportionate penalties are somewhat unclear. For example, when has the servicer failed to provide the payoff statement upon request? Is that only a matter of a certain number of days (the Board's Commentary indicates that three business days is generally a reasonable time)? Does it matter how or where the request was made? What if the request was made to a bank teller while the consumer was making a deposit and the request did not get forwarded to the proper servicing area of the bank or did not reach the servicing area in time to meet the three business day response time? What constitutes a failure to provide a "schedule of fees and charges" upon request? If some fee is alleged to be missed, is that a failure to provide the schedule? What "fees and charges" are supposed to be disclosed in such schedule? Does that include fees and charges in connection with default? The Board's Commentary indicates that fees charged by third parties assessed on the consumer must be disclosed, but these might not always be accurately known by the creditor until billed. TILA and Regulation Z have a 40-year history of the complexity of determining what fees charged by creditors in connection with loans are required to be disclosed or not and in what manner, and now all of the sudden the Board is proposing a fee disclosure requirement for servicers that is subject to substantially higher civil penalties than for normal loan disclosures with very little direction beyond the bare requirement to provide the schedule of fees.

There is thus a great deal of uncertainty surrounding these servicer requirements where the slightest infraction results in very substantial penalties that are completely out of proportion to the error that occurred. At a minimum, these servicing provisions should not be subject to the additional HOEPA penalties in TILA section 130, any enforcement should be with respect to a pattern and practice of abuse rather than on isolated individual infractions, and no penalty should be applicable without a written follow-up demand addressed to an address identified by the servicer to handle such requests and providing a reasonable time for response.

Advertising and Early Disclosure

Because the Board is proposing changes with respect to advertising and early disclosures applicable to dwelling-secured loans as part of this rulemaking under TILA section 129 as added by HOEPA, the effect of this rulemaking may be to bring all of the TILA advertising and disclosure requirements within the scope of the civil liability provisions of TILA section 130, including the additional penalties originally intended only for loans subject to HOEPA.

[4] How would the civil liability provisions of TILA section 130 be applicable here? As noted above, section 130 establishes civil liability for "creditors", and if the servicer is a different entity than the creditor, will the creditor be liable for the infraction by the servicer? Or will there be no liability under section 130 since the violation was not a violation by the creditor?

Currently, violations of advertising requirements are not subject to the civil liability provisions of section 130, and the TILA disclosure requirements are not (except for HOEPA loans) subject to the additional penalties under section 130 for HOEPA loans. We believe that the Board should make clear that all of the changes being proposed with respect to advertising under sections 226.16 and 226.24 and early disclosures under 226.19 are being made pursuant to the Board's authority under TILA section 105 in order to make clear that the Board is not intending to expand either the scope of requirements subject to section 130 or to the additional HOEPA penalties under section 130.

Thank you for the opportunity to provide these comments.

Very truly yours,

Daniel W. Morton
Senior Vice President & Senior Counsel